JNA Ikhtisas Sdn Bhd v Kerajaan Malaysia

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 21C-04–09 OF 2013
MARY LIM J
24 JULY 2014

Contract — Building contract — Consultant — Claim by engineer for professional fee for work done — Engineers instructed to prepare drawings and tender documents but subsequently not appointed as engineering consultants for project — Whether entitled to claim consultation fees – Whether absence of formal contract fatal to claim for consultation fees — Determining extent of fees payable

Contract — Recovery — Recovery for work done — Consultancy fees — Engineers instructed to prepare drawings and tender documents but subsequently not appointed as engineering consultants for project — Whether entitled to claim consultation fees — Whether absence of formal contract fatal to claim for consultation fees — Determining extent of fees payable

Professions — Engineers — Claim by engineer for professional fee for work done — Engineers instructed to prepare drawings and tender documents but subsequently not appointed as engineering consultants for project — Whether entitled to claim consultation fees — Whether absence of formal contract fatal to claim for consultation fees — Determining extent of fees payable

Intrasegi Sdn Bhd–Tegas Setuju Sdn Bhd were appointed by the defendant as the main contractor for phase 1 of the construction of Tegar Prison at Johor Bahru by way of a design and build contract ('the project'). The plaintiff was appointed as the engineering consultants. Both the plaintiff and the architect prepared various plans including the master plan, building plans and infrastructure plans for the whole project. However, the defendant then decided to scale down and implement the scope of works for the project by several phases. Phase 1 was successfully completed on 4 April 2011. Before the completion of phase 1, the defendant decided to embark on phase 2 using the 'conventional' or 'restricted or limited tender' method. By this, the plaintiff and the consultants involved in phase 1 would be appointed and directed to prepare all relevant drawings and documents for tender and to deliver the same to JKR according to scheduled dates. The plaintiff and the consultants involved in phase 1 were roped in. Meetings were conducted and work was carried out. The plaintiff prepared or assisted in the preparation of drawings and tender documents which were then reviewed and discussed at those various meetings.

Estimated costs and timelines for the progress of the works were also prepared. However, the Ministry of Finance then decided to implement phase 2 through a design and built contract with the same contractor for phase 1. With this decision, all discussions with the consultants, including the plaintiff, stopped. The plaintiff was not appointed as the civil and engineering consultants for phase 2. The plaintiff thus submitted its claim for RM2,367,242.35 as its consultation fees. The defendant refused claiming that there was no contract between the parties. The defendant also contended that the plaintiff was not entitled to that sum as it had not carried work of the extent claimed. The first issue arising to be determined was whether there was a contract between the parties for phase 2 of the project. The defendant contended that there was no contract because there were no official letters including letter of award issued to the plaintiff for such appointment. There was also no contract signed. The second issue to be determined was what stage had the plaintiff's works reached.

Held, allowing the plaintiff's claim:

(1) There was ample evidence to show that the plaintiff was required by the defendant to prepare civil and structural drawings which the defendant subsequently used in the limited tender contract for phase 2. In fact, the pleaded defence showed that the defendant did in fact ask the plaintiff to prepare the requisite drawings (see paras 26–27).

(2) While it was not in dispute that there was a change of methodology of execution or implementation of phase 2, it was not in dispute that the defendant asked the plaintiff to do the work and provide the services for which the plaintiff now claimed payment. Although there was no formal contract entered between the parties, the elements of offer, acceptance and consideration necessary for the formation of a contract were clearly present. The offer was made by the defendant which was accepted by the plaintiff (see para 31).

(3) The fact that there was no formal contract was irrelevant. It was not the defendant's case that the parties had agreed that there would be no binding contract until and unless a formal contract had been executed; or that this was a subject to contract arrangement between the parties. There was indeed a valid and binding contract between the parties in the facts of this case (see paras 35 & 38).

(4) The plaintiff had completed the structural drawings, but not the civil drawings. However, so long as the plaintiff had assisted in the relevant work, it should be paid. The question was the degree of involvement, whether it had done all that was required (see paras 51 & 57).

[Bahasa Malaysia summary

Intrasegi Sdn Bhd–Tegas Setuju Sdn Bhd dilantik oleh defendan sebagai kontraktor utama bagi fasa 1 pembinaan Penjara Tegar di Johor Bahru melalui

kontrak reka bentuk dan bina ('projek'). Plaintif dilantik sebagai perunding kejuruteraan. Kedua-dua plaintif dan arkitek menyediakan pelbagai pelan termasuk pelan induk, pelan pembinaan dan pelan infrastruktur untuk keseluruhan projek. Walau bagaimanapun, defendan kemudiannya memutuskan untuk mengurangkan dan melaksanakan skop kerja bagi projek tersebut dengan beberapa fasa. Fasa 1 berjaya siap pada 4 April 2011. Sebelum penyiapan fasa 1, defendan memutuskan untuk memulakan fasa 2 dengan menggunakan cara '*conventional*' atau '*restricted or limited tender*'. Dengan ini, plaintif dan perunding terlibat dalam fasa 1 akan dilantik dan diarahkan untuk menyediakan kesemua lukisan dan dokumen relevan untuk tender dan menyerahkan yang sama kepada JKR mengikut tarikh-tarikh yang dijadualkan. Plaintif dan perunding terlibat dalam fasa 1 dibawa masuk. Mesyuarat dijalankan dan kerja dilaksanakan. Plaintif menyediakan atau membantu dalam penyediaan dokumen lukisan dan tender yang mana kemudiannya disemak dan dibincangkan pada pelbagai mesyuarat tersebut. Kos dan masa anggaran untuk kemajuan kerja juga disediakan. Walau bagaimanapun, Kementerian Kewangan kemudiannya memutuskan untuk memulakan fasa 2 melalui kontrak reka bentuk dan bina dengan kontraktor yang sama untuk fasa 1. Dengan keputusan ini, kesemua perbincangan dengan perunding, termasuk plaintif, diberhentikan. Plaintif tidak dilantik sebagai perunding awam dan kejuruteraan bagi fasa 2. Plaintif oleh itu memasukkan tuntutannya bagi jumlah sebanyak RM2,367,242.35 sebagai fi perundingannya. Defendan enggan dengan mendakwa bahawa tidak terdapat kontrak di antara pihak-pihak. Defendan juga berhujah bahawa plaintif tidak berhak kepada jumlah tersebut kerana ia tidak menjalankan kerja yang dituntut. Isu pertama yang berbangkit untuk ditentukan adalah sama ada terdapat kontrak di antara pihak-pihak bagi fasa 2 projek tersebut. Defendan berhujah bahawa tidak terdapat kontrak kerana tidak terdapat surat-surat rasmi termasuk surat award yang dikeluarkan kepada plaintif untuk perlantikan sedemikian. Juga tidak terdapat kontrak yang ditandatangani. Isu kedua untuk ditentukan adalah tahap manakah kerja plaintif yang telah tercapai.

Diputuskan, membenarkan tuntutan plaintif:

(1) Terdapat keterangan yang banyak untuk menunjukkan bahawa plaintif dikehendaki oleh defendan untuk menyediakan lukisan awam dan struktur yang mana defendan kemudiannya guna di dalam kontrak tender terhad bagi fasa 2. Sebenarnya, pembelaan yang diplid menunjukkan bahawa defendan telah sebenarnya meminta plaintif menyediakan lukisan yang diperlukan tersebut (lihat perenggan 26–27).

(2) Walaupun ia bukan dalam pertikaian bahawa terdapat pertukaran methodologi perlaksanaan fasa 2, ia tidak dipertikaikan bahawa defendan meminta plaintif untuk membuat kerja dan memberikan perkhidmatan yang mana sekarang ini plaintif menuntut bayarannya.

Meskipun tidak terdapat kontrak rasmi yang dimasuki di antara pihak-pihak, unsur tawaran, penerimaan dan pertimbangan yang perlu untuk pembentukan kontrak jelas ada. Tawaran dibuat oleh defendan yang mana diterima oleh plaintif (lihat perenggan 31).

(3) Fakta bahawa tidak terdapat kontrak rasmi adalah tidak relevan. Ia bukan kes defendan bahawa pihak-pihak telah bersetuju bahawa tidak akan terdapat kontrak mengikat sehingga dan kecuali kontrak rasmi telah disempurnakan; atau ini adalah subjek kepada penyusunan kontrak di antara pihak-pihak. Memang terdapat kontrak sah dan mengikat di antara pihak-pihak dalam fakta kes ini (lihat perenggan 35 & 38).

(4) Plaintif telah menyiapkan lukisan struktur, tetapi bukan lukisan awam. Walau bagaimanapun, asalkan plaintif telah membantu dalam kerja relevan, ia patut dibayar. Soalannya adalah tahap penglibatan, sama ada ia telah melakukan kesemua yang dikehendaki (lihat perenggan 51 & 57).]]]

Notes

For cases on consultant, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3959–3960.

For cases on engineers in general, see 10(2) *Mallal's Digest* (5th Ed, 2015) paras 1884–1892.

For cases on recovery for work done, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6413–6415.

Cases referred to

Air Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754 ; [1994] 3 CLJ 133, SC (refd)

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327; [1997] 1 CLJ 625, CA (refd)

Eckhardt Marine Gmbh v Sheriff, High Court Of Malaya, Seremban & Ors [2001] 4 MLJ 49; [2001] 3 CLJ 864, CA (refd)

Legislation referred to

Registration of Engineers Act 1967

Adnan Seman (Adnan Sharida & Assoc) for the plaintiff.

Fazilah Mansor (Federal Counsel, Attorney General's Chambers) for the defendant.

Mary Lim J:

FACTUAL BACKGROUND

[1] Intrasegi Sdn Bhd–Tegas Setuju Sdn Bhd were appointed by the defendant as the main contractor for phase 1 of the construction of Tegar Prison at Johor Bahru by way of a design and build contract ('the project'). The plaintiff was appointed as the engineering consultants while Mohd Azli *Arkitek* ('the architect') was appointed as the architect. Both the plaintiff and the architect prepared various plans including the master plan, building plansand infrastructure plans for the whole project. However, the defendant decided to scale down and implement the scope of works for the project by several phases. Phase 1 was successfully completed on 4 April 2011.

[2] Before the completion of phase 1, the defendant, through Jabatan Kerja Raya ('JKR'), the agency designated by the defendant as its implementing agency, decided to embark on phase 2 using the 'conventional' or 'restricted or limited tender' method. By this, the plaintiff and the consultants involved in phase 1 would be appointed and directed to prepare all relevant drawings and documents for tender and to deliver the same to JKR according to scheduled dates

[3] The plaintiff and the consultants involved in phase 1 were roped in. Meetings were conducted and work was carried out. The plaintiff prepared or assisted in the preparation of drawings and tender documents which were then reviewed and discussed at those various meetings. Estimated costs and timelines for the progress of the works were also prepared. Tender dates were also set.

[4] On 25 January 2011, the Ministry of Finance decided to implement phase 2 through a design and built contract with the same contractor for phase 1, that is, Intrasegi Sdn Bhd–Tegas Setuju Sdn Bhd. With this decision, all discussions with the consultants, including the plaintiff, stopped. The plaintiff was not appointed as the civil and engineering consultants by Intrasegi Sdn Bhd–Tegas Setuju Sdn Bhd.

[5] The plaintiff submitted its claim for RM2,367,242.35 as its consultation fees. The defendant refused claiming that there was no contract between the parties. In any case, the plaintiff is not entitled to that sum as it had not carried work of the extent claimed.

TRIAL

[6] The plaintiff called Ir Azizi bin Bujal ('PW1') who testified that the plaintiff together with the architect, Mohd Azli *Arkitek* ('the architect') had prepared all the drawings required for the project. The plaintiff had prepared the master plan, building plans, and infrastructure plan for the whole development of the project. These drawings had been approved by the defendant.

[7] On 31 March 2010, the plaintiff received the layout plan for phase 2 of the project from the architect. It gave its input and made amendments to the drawings on various matters including on earthworks platform, location of the treatment plant, drainage retention pond. Upon completion, the plaintiff sent the lay out plan to the defendant for verification and approval.

[8] Following this, the architect provided the plaintiff with the layout plan for phase 2. The plaintiff claimed that it gave its input and made amendments with regards several matters such as the earthworks platform, location of the treatment plant, drainage, retention pond. Thereafter, the layout plan for phase 2 was sent to JKR through the architect for JKR's verification and approval.

[9] On 19 April 2010, the plaintiff and the architect attended a meeting conducted by JKR. The plaintiff claimed that the layout plan that it had submitted was agreed upon by all present. At that meeting, it was also agreed that the quantity surveyor ('QS') was to prepare the estimation costs. The layout plan was subsequently sent to Jabatan Penjara Malaysia ('JPM') for its approval. JPM then called for a meeting on 24 April 2010. The plaintiff attended that meeting together with JKR and other consultants. At that meeting, the architect made a presentation using the layout as prepared by the plaintiff. JPM made some amendments to that layout. The estimation costs were also prepared and presented by the QS at that meeting.

[10] A second meeting was later held on 18 June 2010. JPM and JKR are said to have informed all present at the meeting that phase 2 would be implemented using the conventional method. JPM is said to have approved the layout plan on 25 June 2010.

[11] On 7 July 2010, this time at a meeting at JKR's office, attended by the plaintiff and representatives from JPM and other consultants, JKR agreed and confirmed that the layout plan prepared by the architect to JPM based on approved budget. JKR is said to have also confirmed that the project would be implemented conventionally. Dates for the progress of the project were then fixed.

[12] The plaintiff claimed that it was instructed to prepare and provide civil and structural tender drawings on or before 31 July 2010. The statement of tender offer to selected tenderers was scheduled for 27 August 2010. The tender documents would be sold on 1 September 2010. PW1 further testified as to the calculation of the plaintiff's fees. I shall deal with this later.

[13] The evidence of PW1 is actually substantially confirmed by the defendant's witnesses. Ir Ma'arof bin Baharom ('DW1'), the senior assistant at *Cawangan Kerja Keselamatan* of JKR informed the court that phase 2 involved the construction of additional blocks to house inmates, residence for the prison officers; and related works. DW1 also told the court that JKR's 'client' was the Ministry of Home Affairs ('KDN').

[14] It was DW1's evidence that JKR decided to be proactive when the Prison Department, which comes under the purview of KDN, required phase 2 to be implemented as soon as possible. JKR took the initiative of calling the head of the design team ('HODT') and the consultants involved in phase 1 together for this purpose. This included the plaintiff. In order to ensure that this team would be appointed for phase 2, it was decided that phase 2 had to be implemented and executed by way of a limited or restricted tender, otherwise known as the 'conventional' method. Insofar as the plaintiff was concerned, it was asked to provide civil and structural tender drawings.

[15] DW1 claimed that the parties were still in the process of obtaining approval for the plaintiff's appointment at the time the MOF decided to implement phase 2 on design and built contract terms. Under such a contract, the appointment of consultants rested solely with the main contractor, and no longer with the defendant.

[16] DW1's evidence was corroborated by that of Abd Halim bin Ibrahim ('DW2'), a senior assistant director (Structure). DW2 was responsible for approving the various plans prepared. He is also responsible for appointing consultants and recommending their payments. DW2 testified that he was involved in the approval of the structural drawings prepared by the plaintiff. He was at the meetings of 8 January 2010 and 7 July 2010. DW2 confirmed that it was, inter alia, agreed at the meeting of 7 July 2010 that phase 2 would be implemented by conventional contract using the consultants in phase 1. That included the plaintiff who was the structural consultants.

[17] DW2 confirmed too, that the plaintiff completed the structural drawings for tender before 31 July 2010; and that such drawings were 50% completed. However, he subsequently testified that the plaintiff only submitted the draft tender drawings on 18 August 2010; and that these drawings had to be amended as they did not meet the IBS score. The plaintiff

amended these drawings and on 5 October 2010, the IBS score of over 40% was satisfied.

[18] JKR subsequently gave its comments to these amended drawings. These comments were staggered over a period of time, involving different blocks or structures. This can be seen from the defendant's letters dated 25 November 2010, 30 November 2010, 5 January 2011 and 7 January 2011 at pp 39–48 and 53–71 of CBD1. According to DW2, the plaintiff did not revert with any responses. The plaintiff did not revert with any further amended drawings.

[19] On 19 January 2011, DW1 was instructed to appoint the plaintiff as the civil and structural consultants. He then set about sorting that out. The plaintiff's appointment was however, rejected as it did not meet certain criteria– see letter dated 16 February 2011 at CBD 1. By the time the plaintiff reverted with the revised drawings on 22 March 2011, the defendant had already announced that phase 2 would be implemented on design and built terms. This was on 21 February 2011.

[20] The rest of DW2's evidence deals with the computation of the fees payable, if any, to the plaintiff. I shall deal with this later.

ISSUES

[21] These are the two issues:

(a) whether there is a contract between the parties; and

(b) if there is, what is the stage of works reached?

Determination

First issue: whether there is a contract between the parties

[22] In relation to the first issue of the existence of contract between the parties for phase 2 of the project, it is the defendant's case that there is no contract because there were no official letters including letter of award issued to the plaintiff for such appointment. There is also no contract signed. There may have been correspondence exchanged between the parties, discussions or meetings held where the plaintiff was asked to submit calculations for the IBS score, but that was all.

[23] It was alleged that the plaintiff knew at all material times that its appointment was not for the defendant or JKR to make; but one to be made in accordance with guidelines issued by the Ministry of Finance. At para 9(d), the

defendant alleged that because all parties presumed (*mempunyai anggapan*) that phase 2 would be executed by way of a conventional contract wherein the parties involved in phase 1 would be reappointed, the plaintiff was asked by the architect to prepare the engineering drawings for phase 2.

[24] DW1 testified that JKR was still in the process of getting approval for the appointment of consultants from the Consultants Appointments Committee and Ministry of Finance. That approval was not given as MOF decided by letter dated 25 January 2011 that phase 2 of the project would be implemented under design and build terms instead of by conventional tender. With such a decision, the appointment of consultants was entirely the decision of the contractor awarded the contract. It was not within the defendant's powers to dictate or direct the contractor on the appointment of any consultant. Neither did the defendant have any obligation nor responsibility in management matters between the plaintiff and the contractor appointed. The defendant denied any knowledge as to why the plaintiff was not reappointed by the contractor as the civil and structural engineer for phase 2.

[25] According to the defendant, the plaintiff was well aware of all these matters. Further, it was contended that the plaintiff knew as far back as July 2010 that the drawings were for tender purposes and that such drawings had to be approved by KDN before they would be used. Since the drawings submitted by the plaintiff were never approved or accepted by the defendant as documents for tender, consequentially, there was no legal relationship and no contract between the parties. It was also contended that as at March 2011, the drawings were only at stage 1 and at only 50% as opposed to the plaintiff's claim of substantial completion.

[26] After evaluating all the evidence presented, the court is satisfied that there is ample evidence to show that the plaintiff was required by the defendant to prepare civil and structural drawings which the defendant subsequently used in the limited tender contract for phase 2. Not only is this forthcoming from PW1 but also from the evidence of DW1 and DW2 which have already been set out earlier.

[27] There is also the email dated from the architect found at p 261 of CBD Vol 3. In fact, the pleaded defence shows that the defendant did in fact ask the plaintiff to prepare the requisite drawings.

[28] It must be made clear that it is not the plaintiff's case that its cause of action is for its non appointment as the civil and structural engineers for phase 2. It is simply a claim for work and services rendered.

[29] In response to that claim, the defendant appears to have articulated the argument that because of the circumstances as to how phase 2 was to be implemented originally, that is by direct negotiation with the consultants including the plaintiff; the change of decision to a design and built wherein the appointment of consultants is now a decision of the contractor awarded the contract for phase 2 to make and no longer available for the defendant to decide; that meant that the defendant was not liable for payment of the work or services rendered by the plaintiff.

[30] With respect, the court disagrees.

[31] While it is not in dispute that there was this change of methodology of execution or implementation of phase 2, from conventional direct or limited negotiated contract to a design and built contract, it is also not in dispute that the defendant asked the plaintiff to do the work and provide the services for which the plaintiff now claims payment. Although there is no formal contract entered between the parties, the elements of offer, acceptance and consideration necessary for the formation of a contract are clearly present. The offer was made by the defendant which was accepted by the plaintiff.

[32] These findings accord with the principles as discussed in the Court of Appeal's decision in *Eckhardt Marine Gmbh v Sheriff, High Court Of Malaya, Seremban & Ors* [2001] 4 MLJ 49; [2001] 3 CLJ 864. In that case, the Court of Appeal agreed with the findings of the court of first instance that there was a valid and binding contract. In coming to its decision, the Court of Appeal found it 'appropriate to utilise this opportunity to set out the propositions of law that govern this area'. This court believes it is timely to remind of those same propositions set out at p 867 which principles this court finds to have been met here:

> First, the general approach that is to be adopted by a court in determining whether there is an agreement concluded between the parties is to see whether there is a definite offer made by one party which has been accepted by the other. In other words, whether the agreement in question may be resolved into an offer and a corresponding acceptance. That such an approach should be generally adopted was affirmed by the House of Lords in *Gibson v Manchester City Council* [1979] 1 All ER 972. ...
>
> Second, there are a number of guidelines–we emphasise that these are only guidelines–that have been formulated by courts to ascertain whether there was an offer in a given case and by whom it was made. Thus, as a general rule, an advertisement is considered by courts to be not an offer but a mere invitation to treat, that is to say, an offer to make offers. ...
>
> Third, an offer may be made unconditionally or upon stated conditions. In the later case, an acceptance to be valid must accord with the terms of the offer. A conditional offer lapses upon the failure of the condition. If authority is required for these rather

A elementary propositions, it may be found in *Financings Ltd v Stimson* [1962] 3 All ER 386.

Fourthly, the act of acceptance may be either by words or by conduct or it may be partly by words and partly by conduct. *Brogden v Metropolitan Railway Co* [1877] 2 App Cas 666 is a case of acceptance by conduct. ...

B

[33] The fact that phase 2 was to be implemented by a design and built contract does not alter the fact that the defendant clearly and admittedly asked the plaintiff to render services. Under its first and earlier arrangements, the plaintiff would actually have been paid directly. The obligation to pay remains.
C The plaintiff has duly rendered services required by the defendant. It prepared at least 443 drawings. Many of those drawings were amended and resubmitted by the plaintiff following the defendant's comments and instructions.

D **[34]** This is evident from the fact that the documents prepared by the plaintiff were perused at the meetings held by the defendant– see pp 57–72 of CBD Vol 1. The evidence showed that DW1 had perused, approved and signed the documents prepared by the plaintiff.At that same meeting, the plaintiff was instructed by JKR to submit IBS Score calculation.

E

[35] The fact that there is no formal contract is irrelevant. It is not the defendant's case that the parties had agreed that there would be no binding contract until and unless a formal contract had been executed; or that this was a subject to contract arrangement between the parties (see *Charles Grenier Sdn*
F *Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625; *Air Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; [1994] 3 CLJ 133. Even accepting for a moment that the understanding was for a formalisation of contractual arrangements, as opined by the Court of Appeal in *Charles Grenier Sdn Bhd v Lau Wing Hong* at p 633, it is for the court
G to 'construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties'; that 'an agreement to make an agreement does not result in a contract'. It was the court's view that:

Unless the approach we have stated is adopted, a party to a contract who, after having concluded his bargain, entertains doubts as to the wisdom of the transaction
H may be in an unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be huge loop-hole and commerce would come to a virtual standstill.

The law leans in favour of upholding bargains and not in striking them down
I willy-nilly.

[36] Specifically, in the Supreme Court decision in *Air Hitam Tin Dredging Malaysia Sdn Bhd v YC Chin Enterprise Sdn Bhd*, the court expressed at p 141 that:

> It is well settled that when, an arrangement is made 'subject to contract' (see *Rossdale v Denny* [1921] 1 Ch 57) or 'subject to the preparation and approval of a formal contract' (see *Winn v Bull* [1877] 7 Ch D29) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged.

[37] Quite aside from the fact that this is not what the case is about, there is no evidence that the parties intended that there be no contract until and unless a formal agreement had been drawn up and signed between the parties and a letter of award issued. The evidence points to the contrary. As mentioned earlier, under its original arrangements, the defendant clearly intended the plaintiff to render services under a direct negotiated contract. That arrangement meant that the plaintiff would be paid directly by the defendant; and not by the contractor awarded the design and build contract. Since there is proof that the plaintiff has rendered the services requested by the defendant, the defendant must therefore pay for those services.

[38] The first issue is therefore answered in the plaintiff's favour. There is indeed a valid and binding contract between the parties in the facts of this case.

Second issue: if there is, what is the stage of works reached?

[39] The next issue is the value of work done.There is no evidence nor is it the plaintiff's contention that the plaintiff provided the professional services for free. In fact, the evidence is that the plaintiff expected to be paid for its professional services.

[40] It is necessary to establish the relevant cut-off date. This must be when the defendant decided that the plaintiff would not be appointed. However, should this be the date of the defendant's decision to award phase 2 through a design and built contract; or the date when the plaintiff learns or is informed that it would not be appointed because of the change in policy; or any other date?

[41] It is the view of the court that while the date of the announcement of the implementation by design and built terms made in February 2011 would ordinarily have been that cut-off date, it cannot be the case here. This is because there is no evidence that the plaintiff knew of the defendant's decision at that time. It is therefore the court's findings that the relevant date would be when the plaintiff knew of the defendant's change of decision. In the absence of any other evidence, that date must be end of March.

[42] Moving next to the computation of the fees payable for the services rendered by the plaintiff. Here, the notification of scale of fees (Revised 1998)

issued under the Registration of Engineers Act 1967 as testified by PW1 is instructive. These are approved scaled fees that registered professional engineers can charge for their professional advice or services.

[43] First, under the scale fees, the consultant's costs are calculated according to the costs of the project. At the design stage, such costs have not been determined as tender has not taken place. For such conditions, DW2 testified that JKR will then use what is referred to as the 'ceiling costs of the project' as the 'costs of the project'. Here, RM157,900,000 was the ceiling costs. From such costs, 10% was deducted for non-actual work costs ('kos bukan kerja sebenar seperti bayaran yuran perunding arkitek, mekanikal, ukur bahan, iklan dan sebagainya'). That left the value of the ceiling costs of the project as RM142,110,000.

[44] Civil and structural costs forms 50% of those costs, that is, RM71,055,000. In those civil and structural costs, consultants' fees' is represented by the factor P of 3.92%. That means, the consultants' fees is about RM2,785,356. A further 5% is deducted from the fees as these consultants are not involved in the tender process, leaving a sum of RM2,646,088.20 to be paid to the civil and structural consultants, in the event the project is completed. This is the sum that would have been paid to the plaintiff, if they had been appointed. DW2 has testified that at the preliminaries stage, the consultants may be paid 20% of that fee structural. He also told the court that ceiling costs are generally higher than tender costs.

[45] Under the scale fees, payment to the professional engineers is made according to the stage of works in the project; 20% at preliminaries, 55% at design, 5% at tender, 15% at construction, and 5% during the defects liability period. This is where the professionals remain involved in the execution of the project. In this case, the plaintiff did not. So, any payment must be made upfront. The question is whether the plaintiff had completed its work. The plaintiff is prepared to say that it is not entitled to the full sum as its work had not reached the tender stage.

[46] However, it must be borne in mind that insofar as the stage payments are concerned, with respect, the timelines of payment against these stages are only relevant where and when the plaintiff is still involved in the project. In such a case, the consultant remains as part of the construction team and it awaits its payments like everyone else. Here, the plaintiff is not part of that team. The stage payments are therefore useful more as a guide as to the amount of work done and the amount that may be billed by the plaintiff as due from the defendant. As will be seen, even the defendant has assessed the plaintiff's fees according to such a scale.

[47] The plaintiff's claim for its fees out of the total fees of RM2,977,663.33 is RM2,785,356 with a further 5% deducted for the tender process, leaving a sum of RM2,646,088.20. The plaintiff's figures are prepared on an assumption that the value of the project is RM157,326,900. The defendant has testified that the value was RM157,900,000. It has however deducted 10% from this value for administrative costs leaving a sum of RM142,100,000. Structural works represent 50% which is a sum of RM71,055,000. Fees are paid on a ratio of 3.92 which is a sum of RM2,785,356. A further 5% is deducted at the tender stage; and the plaintiff's claim is the sum of RM2,646,088.20.

[48] It was DW2's testimony that the payment of the consultants would depend on the stage of the execution of the project. For example, 20% for the preliminaries stage; 35% for the design stage (i); 20% for the design stage (ii); 5% for tender stage; 15% for construction stage; and 5% for defect stage. According to JKR's policy, design stage (i) is where the tender drawings have been approved and used in the tender design stage (ii) is where the building plans are issued by the contractor. In this case, there was no approval of the tender drawings. There were still amendments afoot and requiring actions from the plaintiff. That being the case, DW2's department estimated that the plaintiff's works had only reached 50% of design stage (i). DW2 was of the view that the plaintiff's works was still at design stage (i); and that it was only 50% completed as only the structural drawings had been completed but not, the civil drawings. DW2 testified that the plaintiff could therefore only be paid 50% of design stage (i).

[49] From the evidence before the court, it can be deduced that the parties are agreed that the plaintiff has completed the preliminaries stage. At the next stage of design, there are two levels: design stage (i) and design stage (ii). The earlier is where the professional has provided services in preparing designs, including reinforced concrete and structural steel work designs, and tender drawings in connection with the works; whereas design stage (ii) is where the professional renders services in preparing such conditions of contract, specifications, schedules and bills of quantities as may be necessary to enable the client to obtain tenders or otherwise award a contract for carrying out the works. At design stage (i), the professional would be paid 35% while at design stage (ii), the professional would be paid a further 20%.

[50] As to the extent or value of works subsequently completed, the plaintiff claimed that it had reached at least 75% of the stage anticipated– see p 165 of CBD Vol 2. Aside from the invoice prepared by the plaintiff and found at pp 7–9 of CBD Vol 1, there is the plaintiff's final submission made on 22 March 2011 (minor amendments last made in November 2010). At this point in time, the plaintiff claimed that it had completed stage preliminaries and both design stages (i) and (ii) (see p 7 of CBD 1) whereas the defendant alleged that the

plaintiff had only completed half the work at design stage (i).

[51] From DW2's testimony, it can be seen that he agrees that the plaintiff had completed the structural drawings, but not the civil drawings. As far as he was concerned, the plaintiff should not be paid this 35% which is payable at design stage (i) because the defendant had not approved the civil drawings prepared and submitted by the plaintiff. He testified that the plaintiff should only be paid 50% of this level; that is, 17.5% (of 35%).

[52] In relation to the defendant's contention that because the plaintiff's work was never approved, there should be no payment, the court finds that there is in fact evidence of the plaintiff being asked to amend its work. These instructions were given over a period of time according to the blocks or buildings involved and not, wholesale. There is no evidence as to datelines to be adhered to by the plaintiff; that if the plaintiff did not revert by a particular time, then the drawings would not be accepted. There is also no suggestion that the plaintiff had failed to amend or revert, in time or at all. As far as the defendant's case goes, there is no payment for phase 2 unless and until the plaintiff's work was approved. Because there is no evidence of approval, and that was admitted by PW1, there can be no payment. It is the court's view and finding that the amendments sought by the defendant and acted upon by the plaintiff amount to work towards obtaining the requisite approval. Under such conditions, the defendant cannot turn round to suggest that the work of the plaintiff is not payable.

[53] It appears from the evidence that the moment Ministry of Finance and subsequently, KDN decided to implement phase 2 by way of a design and built contract, everyone seemed to have forgotten about the plaintiff. No one seemed to have advised the plaintiff that its services were no longer required. PW1 testified that he only knew of the defendant's change of decision at the end of March. By this time, it had already submitted its amendments. Even the plaintiff's letter of demand sent in May 2011 was not responded to by the defendant. The plaintiff was not cross-examined on this.

[54] In my view, the non-approval of the plaintiff's work is actually not due to any fault on the part of the plaintiff at all. As testified by the defendant's witnesses, nothing moved in relation to the plaintiff and its work the moment it was decided that phase 2 would be implemented by way of a design and built contract; and not by way of limited conventional contract. The plaintiff's amended work or work on the civil drawings was not approved not because the defendant did not approve it, but simply because the defendant did not set about considering it in the first place. The plaintiff cannot be faulted for this default of the defendant. The plaintiff is entitled to be paid. There is no evidence to suggest that the plaintiff's work was well below the requirements;

or that the work would not have been approved at the relevant time. Under such conditions, the court must assume that the plaintiff's work was according to the requirements of the defendant and that the plaintiff must be paid accordingly.

[55] There is evidence that the plaintiff's work was indeed at design stage (ii) as its work was incorporated by JUB Central Sdn Bhd who prepared the tender documents including the preparation of the bills of quantities. At design stage (ii), the payment is not concerned with the success or methodology of the award. It is about the kind of input expected of the professional plaintiff. Here, it is expected to render services towards the award, involving matters such as preparing the conditions of contract, specifications, schedules and bills of quantities. PW1 testified that the plaintiff had done precisely this– see Q&A 22 and exchange of emails between the plaintiff and JUB Central, the QS at pp 205–229 of CBD 3.

[56] The defendant has also taken issue of the absence of construction drawings; that because there are no such drawings, the plaintiff is not entitled to be paid.

[57] With respect, the court disagrees. The scale fees have not affixed such requirement. So long as the plaintiff has assisted in the relevant work, it should be paid. The question is the degree of involvement, whether it has done all that was required. The evidence indicates that even design stage 2 had been reached. The way the scale fees are structured, it is quite logical. At the design stage, the professional would first assist in the preparation of designs and tender drawings in the project before assisting in the preparation of the conditions of contract relating to the award of the project.

[58] In this case, the evidence reveal the parties involved in doing both at around the same time and not necessarily in that ordered fashion. This is probably because of the familiarity gained from phase 1. Be that as it may, the court is satisfied that the plaintiff was at design stage and that both levels at this stage had been met.

[59] As the plaintiff had reached 55% by design stage (ii), the plaintiff is entitled to be paid 55% of this sum which is RM1,531,945.80. More than that, the court finds that the plaintiff has reached design stage (ii) where the plaintiff is therefore entitled to be paid 75% of its total fees. That 75% is a sum or RM2,089,017 together with interest at the rate of 5% pa from the date of judgment to the date of realisation together with costs of RM50,000.

Plaintiff's claim allowed.

Reported by Kanesh Sundrum